

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	No. 1:96CV01285
Plaintiffs,)	(Judge Lamberth)
v.)	
)	
GALE A. NORTON, Secretary of)	
the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' MOTION FOR A PROTECTIVE
ORDER REGARDING PLAINTIFFS' NOTICE OF
DEPOSITION OF THE SECRETARY OF INTERIOR**

On November 4, 2003, without any prior communication to counsel for Defendants,¹ Plaintiffs noticed the deposition of the Secretary of the Interior for November 13, 2003 ("Notice of Deposition") (attached as Exhibit 1). Plaintiffs are not permitted to depose the Secretary because they are not entitled to any discovery at this time. Even if discovery were appropriate now, Plaintiffs cannot show the requisite extraordinary circumstances that would justify the deposition of a Cabinet official. Plaintiffs cannot demonstrate how discovery of the Secretary would be permitted under the principles of review for cases where jurisdiction is based upon the Administrative Procedure Act. Finally, discovery from the Secretary would not be within the scope of permissible discovery under Fed. R. Civ. P. 26(b). Accordingly, pursuant to Fed. R.

^{1/} In noticing the Secretary's deposition without any prior communication regarding availability of the deponent or her counsel, Plaintiffs have ignored the Court's admonition that counsel should confer regarding the scheduling of depositions. See Order of May 8, 1998; Transcript of November 6, 1998 Hearing at 2 ("I don't know what's happened to the notion that I was trying to set forth in May about civility, but I don't think that the plaintiff should have noticed those depositions without a discussion about dates with the defendants first") (attached as Exhibit 2).

Civ. P. 26(c), Defendants move for a protective order preventing the noticed deposition of the Secretary.²

ARGUMENT

I. THE SECRETARY'S DEPOSITION SHOULD NOT BE PERMITTED BECAUSE NO DISCOVERY IS ALLOWED AT THIS TIME

Plaintiffs are not authorized to take any discovery at this time. Fact discovery for the Phase 1.5 trial closed on March 28, 2003, the trial itself was concluded over three months ago and the Court ruled upon the issues raised therein on September 25, 2003. Plaintiffs have not sought leave of Court to take discovery out of time, and there is no indication in the Court's October 17, 2002 Phase 1.5 Trial Discovery Order that the Plaintiffs were authorized to conduct roving discovery after Trial 1.5.

In addition, nothing in the structural injunction issued by the Court on September 25, 2003, provides for further discovery. The Court's injunction establishes a series of deadlines through September 30, 2007, for the Department of Interior to perform specific tasks. Under the schedules established by the Court's September 25, 2003 orders, a Phase II trial is likely, and it is possible that there will be discovery associated with it. However, there is no discovery order setting a discovery schedule for a Phase II trial.

Nor are there other proceedings before the Court requiring discovery. Even if the noticed deposition of the Secretary were purportedly related to some future proceeding in this case, the parties have not held a discovery planning conference pursuant to Federal Rule of Civil

² As required by Fed. R. Civ. P. 26(c), and Local Rule 7(m), counsel for Defendants conferred with counsel for Plaintiffs on November 5, 2003 in an attempt to resolve this dispute without Court action. Plaintiffs expressed an intent to oppose the relief requested here.

Procedure 26(f) and, therefore, Plaintiffs are not authorized to take discovery. Fed. R. Civ. P. 26(d), 30(a)(2)(C) and 34(b). Because no discovery is permitted at this time, the Court should issue a protective order to prevent the noticed deposition of the Secretary.

II. THE SECRETARY'S DEPOSITION SHOULD NOT BE PERMITTED BECAUSE HIGH-RANKING GOVERNMENT OFFICIALS CANNOT BE DEPOSED ABSENT EXTRAORDINARY CIRCUMSTANCES

Even if discovery were appropriate at this time, Plaintiffs would not be permitted to take the deposition of the Secretary of Interior. As the D.C. Circuit has made clear, “top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.” Simplex Time-Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing United States v. Morgan, 313 U.S. 409, 422 (1941)); see also In re United States, 197 F.3d 310, 313-14 (8th Cir. 1999) (same); In re United States, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (“the practice of calling high officials as witnesses should be discouraged”); In re Office of Inspector Gen., 933 F.2d 276, 278 (5th Cir. 1991) (“exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted”).

The primary basis for this rule was explained in Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964):

If the head of a government agency were subject to having his deposition taken concerning any litigation affecting his agency or any litigation between private parties which may indirectly involve some activity of the agency, we would find that the heads of government departments and members of the President's Cabinet would be spending their time giving depositions and would have no opportunity to perform their functions.

See also Community Fed. Sav. & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983) (“Considering the volume of litigation to which the government is a party, a

failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pre-trial discovery would result in a severe disruption of the government's primary function").

The Court has applied this rule previously in this case. In a March 25, 1999 Order, the Court ruled that before Plaintiffs could take the depositions of high government officials they "shall be required to provide evidence demonstrating and proving: (A) that Plaintiffs have an extraordinary need for these particular depositions; and (B) that the precise information they seek from these individuals is available from no other source." March 25, 1999 Order Granting Consolidated Motion for Protective Order at 1-2.

Plaintiffs cannot make the requisite showing of extraordinary need here. At the meet and confer discussion initiated by Defendants' counsel on November 5, 2003, Plaintiffs' counsel refused to identify the precise subject areas that they would cover during a deposition of the Secretary.³ They claimed the right to explore all "relevant" information. They would only reveal that, among other things, they want to find out the Secretary's actual knowledge regarding compliance with the Court's orders in this case, including compliance with the September 25, 2003 structural injunction.

Plaintiffs' desire to appoint themselves as roving investigators monitoring compliance with this Court's orders does not qualify for the exceptional circumstances permitting a deposition of the Secretary of Interior. As the Eighth Circuit has explained, "[a]llegations that a high government official acted improperly are insufficient to justify the subpoena of that official

³ The refusal to provide information concerning the need for issues that may be explored during a Cabinet official's deposition is sufficient cause to issue a protective order. See United States v. Northside Realty Assocs., 324 F. Supp. 287, 295 (N.D. Ga. 1971).

unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result.” In re United States, 197 F.3d at 314. “[A]t a minimum,” Plaintiffs must demonstrate that the witness sought to be deposed would “possess information essential to [Plaintiffs’] case which is not obtainable from another source.” Id.; see also Alexander v. FBI, 186 F.R.D. 1, 4 (D.D.C. 1998). Because there are no current proceedings for which discovery is needed, Plaintiffs cannot demonstrate that any information is relevant to their case, let alone “essential.” Moreover, Plaintiffs cannot show that any information they would seek to elicit from the Secretary could not be obtained through other means. See Simplex, 766 F.2d at 587.

III. THE SECRETARY’S DEPOSITION IS NOT PROPER UNDER APA PRINCIPLES

Plaintiffs’ attempted discovery is also improper under applicable APA principles. Because Plaintiffs’ claims for declaratory and injunctive relief for an accounting are allowed pursuant to the waiver of sovereign immunity provided in Section 702 of the APA and the jurisdiction of this Court is derived from the APA, discovery should proceed in a way that is consistent with APA review principles. See Cobell v. Norton, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001). Under the APA, judicial review must await final agency action. Id. at 1095; Cobell v. Babbitt, 91 F. Supp. 2d 1, 35-36 (D.D.C. 1999); see also Bennett v. Spear, 520 U.S. 154, 177-78 (1997). Final agency action in this matter on the accountings that will presumably be the subject of Phase II litigation has not occurred, and is not scheduled to occur under the Court’s September 25, 2003 structural injunction until 2007.

While it is premature to speculate about whether discovery would be appropriate prior to Phase II, and if so, how extensive discovery should be, the normal procedure is to look at any administrative record submitted by the agency and where that record is deemed inadequate to remand to the agency for further explanation. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); Camp v. Pitts, 411 U.S. 138, 142-43 (1973); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). In any event, before such final agency action has been rendered there is no basis for discovery directed at Phase II issues.

In cases such as this, a party seeking extra-record discovery has the burden of showing why such discovery and review are necessary. See Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998); Northcoast Env'tl. Center v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998); Animal Defense Council v. Hodel, 840 F.2d 1432, 1436, 1438 (9th Cir. 1988), modified in part, 867 F.2d 1244 (1989); Balaton, Inc. v. Reno, 93 F. Supp. 2d 61, 62 (D.D.C. 2000); Simpkins v. Shalala, 999 F. Supp. 106, 110 (D.D.C. 1998); Conference of State Bank Sup'rs v. Office of Thrift Supervision, 792 F. Supp. 837, 842 (D.D.C. 1992); Marine Transp. Services Sea-Barge Group, Inc. v. Busey, 786 F. Supp. 21, 27 (D.D.C. 1992). Plaintiffs have not met, and cannot meet, this burden, especially when they refuse even to identify the information that they seek to elicit in a deposition of the Secretary.

Permitting Plaintiffs to take the depositions of the Secretary here would also be inappropriate to the extent that Plaintiffs seek to probe the minds of the decisionmaker or those advising her. As the Court stated in Overton Park, 401 U.S. at 420 (citing United States v. Morgan, 313 U.S. at 422), "inquiry into the mental processes of administrative decisionmakers is usually to be avoided." This form of prying into the government decision-making process has

been compared to cross examination of judges on their decisions. Morgan, 313 U.S. at 422 ("Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected").⁴

The APA also limits the scope of permissible discovery with regard to monitoring compliance with the Court's orders. Under the APA, an agency in the midst of completing required tasks should generally be allowed to do so without the interference of constant discovery.⁵ See Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984) ("Postponing review until relevant agency proceedings have been concluded permits an administrative agency to develop a factual record, to apply its expertise to that record, and to avoid piecemeal appeals") (inner quotation omitted).

As discussed above, the Court's September 25, 2003 structural injunction does not authorize Plaintiffs to conduct discovery into compliance with the injunction. Indeed, the Court has retained jurisdiction to monitor compliance. See Cobell v. Norton, No. 96-1285, 2003 WL 22211405, **213-14 (D.D.C. Sep. 25, 2003).

⁴ The deposition of any government official about the decisionmaking process itself encroaches upon the deliberative process privilege. Because Plaintiffs are evasive about their actual intentions in seeking a deposition of the Secretary, Defendants are unable to assert particularized privileges at this point. The likelihood that Plaintiffs' discovery will generate yet another round of discovery disputes over the deliberative process and other privileges counsels a strict adherence to the limits on discovery imposed by the APA.

⁵ Plaintiffs have noticed 15 depositions and propounded 13 sets of requests for production of documents since the Phase 1.5 trial ended.

IV. DISCOVERY FROM THE SECRETARY IS NOT WITHIN THE SCOPE OF PERMISSIBLE DISCOVERY UNDER RULE 26

Even if discovery were otherwise permissible, Plaintiffs cannot show that the discovery sought from the Secretary would be within the scope of the Federal Rules. Under Rule 26(b)(1), parties may only obtain discovery regarding matters that are “relevant to the claim or defense of any party” Fed. R. Civ. P. 26(b)(1). Although information need not be admissible at trial to be discoverable, it still must be “[r]elevant” information and must be “reasonably calculated to lead to the discovery of admissible evidence.” Id.

Plaintiffs’ refusal to describe the information sought from the Secretary makes it difficult for the Court, and Defendants, to assess claims of relevance. As discussed above, however, Defendants are unaware of any discoverable information at this time that would be relevant and reasonably calculated to lead to the discovery of admissible evidence. A deposition of the Secretary could thus necessarily only cover topics outside the scope of permissible discovery. As such, a protective order is needed to prevent the deposition.

CONCLUSION

For these reasons, Interior's Motion for a Protective Order should be granted.

Dated: November 10, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 10, 2003 I served the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of Interior* was served by Electronic Case Filing, and on the following who are not registered for Electronic Case Filing in the manner indicated:

Per the Court's Order of April 17, 2003,
by Facsimile

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/s/ Kevin P. Kingston

Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

ORDER

This matter comes before the Court on Interior Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of the Interior. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Interior Defendants' Motion for a Protective Order is GRANTED; it is further

ORDERED that Plaintiffs are precluded from deposing Secretary Norton at this time.

SO ORDERED.

Date: _____

ROYCE C. LAMBERTH
United States District Judge

cc:

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ELOUISE PEPION COBELL, et al.,
Plaintiffs
v.
GALE NORTON, Secretary
Defendants.

EXHIBIT 1
Defendants' Motion for a Protective Order
Regarding Plaintiffs' Notice of Deposition of the
Secretary of Interior



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November 4, 2003

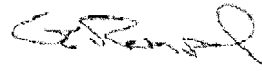
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF DEPOSITION was served on the following by facsimile, pursuant to agreement, on this day, November 4, 2003.

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Geoffrey M. Rempel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Elouise Cobell	.	Docket No. CA 96-1285 RCL
	.	
Plaintiff,	.	
	.	Washington, D.C.
vs.	.	Friday, November 6, 1998
	.	2:07 p.m.
Bruce Babbitt,	.	
	.	
Defendant.	.	
.....	.	

Transcript of Hearing On Discovery Motions
Before the Honorable Royce C. Lamberth
United States District Judge

APPEARANCES:

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Dennis Gingold, Esq.
Keith Harper, Esq.
Lorna Babby, Esq.

For the Defendant:

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Edith Blackwell, Esq.
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Proceedings reported by stenomask, transcript produced
from dictation

Pages 1 through 29

P R O C E E D I N G S

THE CLERK: This is the case in the matter of Civil Action No. 96-1285, Cobell v. Bruce Babbitt, Mr. Peregoy and Mr. Gingold, Mr. Harper and Ms. Babby for the plaintiff. M. Weiner, Ms. Blackwell and Ms. Lundgrin for the defendant.

THE COURT: I have some initial comments I want to make and I do have some questions I want to ask counsel.

Regarding the last round of the discovery disputes, it appears to me the court now having ruled on the questions, a lot of that is moot. The one part of it that is not moot is this notion as to whether or not these individuals who were noticed for depositions have to appear as government employees in Washington, and I had two comments to make about that.

First, I don't know what's happened to the notion that I was trying to set forth in May about civility, but I don't think that the plaintiff should have noticed those depositions without a discussion about dates with the defendants first and perhaps this other question could have been surfaced at the same time about capacities, if there had been that kind of discussion.

In any event, I would expect that dates can be agreed upon. Both sides profess that they are willing to agree upon dates, and I would expect that dates could be agreed upon by a civil discussion between counsel.

As to the question of the depositions being noticed to

1 named the people without their titles, I think the defendants
2 have the better of that argument, and I think there should be
3 re-notices with the name of the individual and their title which
4 then makes it clear that they're appearing as an agent of the
5 government. And under my prior order, then they would have to
6 appear here in Washington as the agent of the government, and I
7 would think that you ought to sit down and talk about those
8 names and proper titles and dates, and within five days of
9 today, try to come to some agreement on those so that the re-
10 notices can be accepted and there can be no further debate about
11 all of that.

12 If there is any further debate, my notion is to move
13 the next scheduled status date from the November 17th probably
14 to the 23rd at 2:00 if all counsel were available and any
15 continuing dispute about this last round, I would then resolve
16 it -- I'm sorry, November 23rd 2:00 p.m. status, would everyone
17 be available then?

18 MR. WEINER: Yes, Your Honor.

19 MR. GINGOLD: Yes, Your Honor.

20 MR. WEINER: Your Honor, a point of clarification,
21 five days, I assume you mean next Friday?

22 THE COURT: Right. Five business days.

23 Then, with that understanding, the Motion to Quash and
24 for a Protective Order filed on the 26th, I guess, and the
25 Motion for Protective Order on the 23rd are all denied without

1 prejudice to revisiting the issues if it becomes necessary at
2 the November 23rd hearing.

3 Now, in terms of the other pending motions that relate
4 to the prospective relief case, I have the motions filed in July
5 that regard the third formal request for production of documents
6 and the Motion for Protective Order that relates to that third
7 formal request for production, and in connection with that, the
8 argument as to whether or not the government needs to go through
9 and make their formal claims of privilege as to any of those
10 documents that it does not produce, and my determination is that
11 I would want to see those privilege claims and privilege logs
12 before I rule on those questions.

13 And so, I want to set a date, and I would think we
14 could set a date of 30 days from today which would then be
15 December 6th. It is a Sunday, so we would do it December 7th
16 for that production and then anything that's not produced, be
17 accompanied by a proper privilege log by December 7th which in
18 effect gives the government the enlargement of time but denies
19 the protective regarding the third formal request.

20 MR. WEINER: Your Honor, with regard to the 30 days,
21 given the voluminous nature of the documents that are requested
22 and the exercise that is going to be required to go through each
23 one to create a privilege log because they requested attorneys
24 documents, 30 days, I've been advised is going to be an
25 insufficient amount of time for my client to collect those

1 documents with the other discovery obligations that we have in
2 this case.

3 THE COURT: Okay. A motion to further extend the time
4 beyond December 7th, I will address at the November 23rd
5 hearing, and whatever evidence you can give me about volume and
6 that sort of stuff, you should be able to assess that by the
7 23rd and give me some information that would let the court make
8 an informed judgement about whether that should be extended
9 beyond December 7th.

10 Now, the last remaining issue goes to the search for
11 documents relating to the plaintiffs, the named plaintiffs and I
12 take it that in one filing by the defendants they said
13 defendants have waited until now to begin the statistical sample
14 because we didn't want to bear the unreasonable burden of
15 producing documents for two separate statistical samples. If we
16 begin our physical sampling, then we can include the five named
17 plaintiffs in the search for additional documents.

18 Since, obviously in light of my ruling, each side is
19 going to have its own statistical sampling or whatever, I don't
20 know how that impacts on the search for the remaining documents
21 for the named plaintiffs.

22 But the first question is whether the court will
23 modify its prior orders requiring those documents to be
24 produced. The court will not and that motion is denied.

25 The second question is then when the government can

1 bring itself into compliance with the prior orders requiring the
2 documents to be produced as to the named plaintiffs and again
3 perhaps you can tell me more at the November 23rd hearing how
4 you expect to go about bringing yourself into compliance.

5 And I think you have to figure out how you're going to
6 go forward now that you're not going to have a joint sampling
7 search. You'll have to figure out how you're going to go about
8 doing the search and we can cover that at the November 23rd
9 hearing as well, unless you want to say something further about
10 that today. You're not required to, but you may, if you wish.

11 [Pause.]

12 THE COURT: All right. Then the last issue I have is
13 this remaining issue on the retrospective relief in the
14 defendant's Motion for Protective Order on the attorney's
15 depositions and the other depositions where the plaintiffs were
16 seeking information that would help in establishing a trial date
17 for the bifurcated part of the case regarding retrospective
18 relief.

19 It seemed to me that it would make more sense for the
20 court to simply have the information about what sort of
21 remaining production and discovery has to be done for the
22 retrospective case in order to set a date and then the court can
23 simply a date, so that I don't know that this kind of discovery
24 is either all that helpful or all that useful, and I would think
25 that I could simply have a hearing and we'll talk about how much

1 time it would take for everyone to explain their positions about
2 what discovery we need, but I would think if I did a two- or a
3 three-hour hearing on the 23rd, we might well be able to simply
4 get the information and set the date, if the plaintiffs have in
5 mind what information you need for the retrospective case and
6 the government can have knowledgeable people here that can
7 answer what kind of search time we're talking about to actually
8 produce those.

9 My notion would be at the end of the 23rd to have
10 enough information that I would just set a date for the second
11 phase of the trial with some notion of what is going to be
12 required to get all the production of documents and whatever
13 else is necessary for both sides to go to that second phase of
14 the trial.

15 Does that pose any problems for either side? And if
16 you think it would take longer than a couple of hours, we could
17 do these prospective things that day and do that the next day.
18 I don't know what kind of time frame you would have in mind to
19 educate the court about what we're talking about in terms of
20 searches and so on.

21 MR. WEINER: Your Honor, given the fact that the 23rd
22 is on a Monday and the type of hearing that you are talking
23 about with respect to retrospective relief would require us to
24 bring people in from out of town and we would prefer to do it on
25 two separate days.

1 THE COURT: Okay.

2 MR. WEINER: We can marshal the resources that we need
3 that are here in Washington for the hearing on the 23rd and have
4 the other on the 24th.

5 THE COURT: Is that agreeable to the plaintiffs?

6 MR. GINGOLD: Yes, Your Honor.

7 THE COURT: If we do it that way, we do it on 10:00
8 a.m. on the 24th for retrospective discovery issues and setting
9 a date for that trial and we would go the 23rd at 2:00 p.m. on
10 the prospective issues that we've talked about here today.

11 Then is there anything else we need to cover today?

12 MR. WEINER: Yes, Your Honor, there is.

13 As you know, Your Honor, we received a copy of the
14 court's order yesterday and it is clear that order does give the
15 parties some much needed direction on what to go and thank you
16 for that.

17 The opinion does raise some questions in our mind
18 about the scope of permissible discovery. It seems that the
19 hearings on the 24th --

20 THE COURT: Oh, I'm sorry, that reminds me. You had
21 one other point that I didn't specifically cover.

22 I did not intent, and one of the reasons for having
23 monthly discovery conferences and statuses, I did not intend for
24 any of the presumptive limits in our local rules to apply to
25 this case. I understand the prior comment at a status only

1 dealt with interrogatories but I don't intend for any of those
2 presumptive limits to apply. They're just presumptions for a
3 court to tailor to the case and I'm doing the tailoring by being
4 here every month and seeing you all every month.

5 MR. WEINER: Thank you.

6 THE COURT: So, you can forget all of those arguments
7 about presumptive limits.

8 MR. WEINER: Thank you for that clarification, Your
9 Honor.

10 The court's order of yesterday does address a great
11 many issues. It also raises some questions in our mind about
12 the scope of discovery going forward. What discovery is
13 permissible in light of the fact there are APA claims, non-APA
14 claims, whether in fact we have to and when we would have to
15 submit an administrative record.

16 THE COURT: I agree.

17 MR. WEINER: And in that regard, it is unclear today,
18 right now, what our obligations are with responding to
19 plaintiff's oversized discovery requests that we received on the
20 last day for discovery and so on.

21 THE COURT: I meant to say I would extend that date.
22 You asked for an extension and I would extend that date to
23 December 1st. And then if you think you have beyond December
24 the 1st, on that date we can take that up as a Motion to Extend
25 it again at that same hearing on the 23rd. So that gives you an

1 additional two weeks beyond your November 17th or whatever it
2 was.

3 MR. WEINER: Thank you, Your Honor.

4 Within the scope of the discovery that was served on
5 defendants, however, is a series of discovery requests relating
6 solely to the government's High Level Implementation Plan.
7 Among the questions we have and we can either address them I
8 guess piecemeal today or have the opportunity to have more than
9 an opportunity to read the decision once or twice and deal with
10 them on the 23rd.

11 But, for example, now the court has defined the High
12 Level Implementation Plan as final agency action, are plaintiffs
13 entitled to extra record review of the HLIP, the High Level
14 Implementation Plan. It would seem that extra record review
15 would be inconsistent with the court's finding that that is
16 final agency action and the court's review would not be de novo
17 but rather on the record that would be submitted by the
18 government.

19 THE COURT: If I reach the APA issue.

20 MR. WEINER: Right. Which would then leads me to the
21 next question. We have an order in this case that bifurcates
22 between what we have call prospective and retrospective. Among
23 the options now could be that perhaps a more appropriate
24 bifurcation, and I have not thought this through fully, would be
25 between statutory and non-statutory claims. And I don't know if

1 the court anticipates that we will address all of these issues
2 on the 23rd.

3 THE COURT: I think we can.

4 MR. WEINER: It also appears that the court in its
5 November 5th order anticipates some Motion for Summary Judgment
6 briefing, yet the existing scheduling order doesn't account for
7 that.

8 THE COURT: I understand. I looked at the old orders
9 to see if it did and it does not. I think we've got to get all
10 of the discovery completed and then put that into the process, I
11 agree, if the parties think that it would be fruitful.

12 MR. WEINER: Well, I think that perhaps one thing that
13 might be fruitful is if let's say by the 17th which is the date
14 the original scheduling order was held, that perhaps each party
15 could submit a proposed scheduling order or a proposed
16 management plan.

17 I know we've been down that road once before. But
18 with the guidance offered by the November 5th hearing, perhaps
19 that would give the court an anticipation of the 23rd, some idea
20 as to (a) how the courts are interpreting the November 5th order
21 which may require some additional elucidation. And second, what
22 we are planning to do in light of that and we would submit that
23 the 17th would give us enough time with the other things we have
24 on our plate to do that.

25 THE COURT: I don't have any problem with that. Does

1 that sound all right to you?

2 MR. GINGOLD: Yes, Your Honor.

3 MR. WEINER: Your Honor, there are some other issues
4 that I think need to be addressed at this point for purposes of
5 efficiency. As the court may be aware, we have taken some
6 depositions in this case. Those depositions have been thwarted
7 to a great extent by plaintiff's conduct in those depositions in
8 refusing to allow witnesses to answer questions without the
9 assertion of privilege.

10 As you may recall in plaintiff's memorandum regarding
11 the sampling approach, they announced to the court that
12 plaintiff's had abandoned statistical sampling because it was
13 unworkable and had adopted their own approach.

14 THE COURT: I thought they said they adopted joint?

15 MR. WEINER: No. They said, "The fact that the
16 mathematical sampling approach hitherto investigated has proven
17 unfeasible, of course, does not leave plaintiffs without a
18 remedy. A remedy, accordingly we have gone back to the drawing
19 board to develop with Price, Waterhouse, Coopers a different
20 method of proving the corrections that should be applied to the
21 account. We will apply this method in the traditional way of
22 the adversary system."

23 THE COURT: Meaning they picked their own samples.

24 MR. WEINER: Right. When we asked -- No. They have
25 said they're not going to use statistical sampling.

1 THE COURT: All right.

2 MR. WEINER: But when we asked plaintiff's expert
3 about their plan, they were instructed by their attorney not to
4 answer the question, not on any assertion of any privilege. I'm
5 flabbergasted that they would instruct a witness without the
6 assertion of privilege not to answer a question relating to a
7 plan that they have alleged in a pleading before this court they
8 have adopted. The witness first said we haven't adopted a plan,
9 which led me to believe, well, did you mislead the court or are
10 you misleading me now. And then when I pressed the issue, they
11 were instructed by their attorneys not to answer the question.
12 That is highly improper, Your Honor.

13 We are entitled to know what their plan is for
14 purposes of, if nothing else, recommending a trial date to the
15 court. They've told the court they could go to trial in six
16 months, based upon this plan. They won't let me find out what
17 this plan is. That's improper.

18 THE COURT: Okay.

19 MR. WEINER: We asked plaintiffs questions regarding
20 their funding sources.

21 THE COURT: Who is the witness?

22 MR. WEINER: The witness was Jessica Pollner, P-O-L-L-
23 N-E-R.

24 THE COURT: Okay.

25 MR. WEINER: We asked the same witness, the funding

1 sources of plaintiff's funds for the litigation. They
2 instructed the witness not to answer, not based on the assertion
3 of any privilege. When we asked what the basis of the objection
4 was, we were told because plaintiff's fear that that funding
5 source or foundation may be subject of some harassment by some
6 source.

7 Your Honor, we're entitled to find out that
8 information to find out who the real party in interest in the
9 case is. Again, there was no assertion of privilege that would
10 otherwise properly frame an instruction to a witness not to
11 answer. These instructions to have witnesses not to answer the
12 question without foundation of privilege have continued.

13 Yesterday, we were trying to take the deposition of
14 another Price, Waterhouse employee. Plaintiff on the record
15 said that they would refuse to allow the witness to answer any
16 questions about plaintiff's statistical sampling plan.

17 Your Honor, it's relevant. It's discoverable. It's
18 not privileged. It relates to matters that have been put before
19 the court and that we need in order to make recommendations to
20 the court. Plaintiff's instructions are improper and are
21 unnecessarily delaying these depositions. They refuse to allow
22 the witness to answer any questions in which he was expressing
23 an opinion.

24 Your Honor, when plaintiffs have submitted to the
25 court a witness list of 120 witnesses, when we asked two of

1 these witnesses if the subject matter they were going to testify
2 about is what is indicated in the witness list, they said, I
3 don't know. We don't know what we're going to testify about.
4 No one asked us. We haven't decided yet.

5 And we said, what else will you testify. They were
6 instructed not to answer. It was premature. When we asked them
7 their opinion about things, they were instructed not to answer.

8 THE COURT: I don't know that you can ask the witness
9 what they expect to testify about. You're talking about a
10 nonexpert?

11 MR. WEINER: Both the experts and the non-experts,
12 they were instructed not to answer.

13 THE COURT: Well, it may be different for the expert.
14 But I mean, you can ask a witness what they know.

15 MR. WEINER: I certainly can, Your Honor. I'm also
16 entitled to ask the witness about his opinions, even if it's a
17 fact witness.

18 THE COURT: I agree. But I don't think you can ask a
19 witness what they expect to testify about.

20 MR. WEINER: Your Honor, we were trying to understand
21 what the source of the identification of the subject matter was
22 in the witness list.

23 THE COURT: Well, wouldn't that normally be posed by
24 interrogatory to a party?

25 MR. WEINER: It could be, Your Honor, but we were

1 doing it through deposition. But in any event, it was a proper
2 question. The witness was instructed not to answer the
3 question. I cannot explain any justification nor could
4 plaintiffs counsel.

5 THE COURT: Well, how could the witness answer that
6 question without getting into attorney work product?

7 MR. WEINER: Well, I'm trying to find out what facts
8 the witness has about things that they could testify about.

9 THE COURT: I understand. You can ask that, but when
10 you ask them what they expect to testify about, wouldn't that
11 necessarily involve their discussion with the attorney?

12 MR. WEINER: Possibly, Your Honor, but that wasn't the
13 basis upon they were instructed not to answer.

14 But again, I asked the witness, one witness, an
15 alleged fact witness, he said he was testifying based upon
16 documents he had reviewed.

17 In a sense and there is case law to support this
18 proposition, that witness is a limited expert with respect to
19 the documents. We're entitled to ask the witness about his
20 opinions of the relevance of the documents, the documents he has
21 reviewed and he hasn't reviewed. Again, those questions were
22 blocked.

23 I know of no foundation or no basis to instruct a
24 witness in a deposition not to answer a question because
25 plaintiffs don't like the questions that are being asked if

1 that's what's happening here.

2 There is another issue that has arisen, Your Honor,
3 that I must bring up at this point that is not in any of the
4 materials that we've filed with the court.

5 We have been advised that one of plaintiff's counsel,
6 Bob Peregoy called Donna Irwin, who is the Director of the
7 Office of Trust Funds Management, and asked her about discovery
8 issues.

9 Plaintiffs know that Ms. Irwin is the Director of the
10 Office of Trust Funds Management. They have disposed her and
11 they know that she is represented by counsel in this case and
12 they called her for the specific reason of asking her if they
13 asked for certain documents in discovery, would she know what
14 they were asking for.

15 Your Honor, that is as clear a violation of the ethics
16 rules as I can imagine. I recognize that there are exceptions
17 to Rule 4.2 that cover contact by people who know another is
18 represented by counsel, but this contact is clearly outside the
19 scope of that exception. This falls within the purview of, I
20 believe subparagraph 7 of Rule 4.2, that precludes discussions
21 with someone an attorney knows to be represented by counsel for
22 purposes of litigation. That's why the conduct was done. Your
23 Honor, we request, to the extent we can now --

24 THE COURT: She is not a party.

25 MR. WEINER: Your Honor, under your definition of a

1 party, she is within our control.

2 THE COURT: I understand.

3 MR. WEINER: She is the Director of the of Trust Funds
4 Management.

5 THE COURT: I understand.

6 MR. WEINER: She is not named as a party, but they
7 know her in this litigation in her capacity as the Director of
8 Trust Funds Management to be represented by us. If plaintiffs
9 had any questions about what discovery they wanted, they're
10 obligated to go through us. They contacted her for the express
11 purpose of saying, if we ask for a document, will you know what
12 it is, can you start gathering those documents. That is highly
13 improper, Your Honor, and we request that the specific -- a
14 request for production of documents that plaintiffs requested
15 and got through this impermissible be struck. This is
16 effectively fruit of the poison tree.

17 THE COURT: I'm not striking anything without a
18 written motion.

19 MR. WEINER: We will then file a written motion, but I
20 think the plaintiffs need to be accountable to the court for
21 their actions, especially when they rise to the level of
22 egregiousness such as is this.

23 THE COURT: Okay. Any other issues you want to raise?

24 MR. WEINER: Not at this time, Your Honor. We will
25 work with plaintiff's counsel to get new notices out to the

1 individuals. We will make the individuals available for
2 deposition in Washington assuming that they are here in their
3 official capacity.

4 THE COURT: All right.

5 MR. GINGOLD: Your Honor, Mr. Weiner has raised
6 several issues which I think we need to address, in addition to
7 a couple of other additional issues.

8 With regard to the last which has been characterize as
9 an egregious violation of D.C. Bar Rules, I would like to point
10 out that first, Ms. Irwin requested through another Native-
11 American Rights Fund attorney that Mr. Peregoy give her a call
12 with regard to obtaining certain public information.

13 Mr. Peregoy contacted the D.C. Bar office, discussed
14 with them the issues with regard to contacting employees of the
15 Department of Interior under circumstances identical to this and
16 was given clearance to discuss with the Department of Interior
17 employees this information, and after thoroughly review the
18 issues, the telephone call was made in response to the request
19 by Ms. Irwin.

20 So to characterize this as egregious, we think is
21 unfortunately consistent with this litigation as jumping the gun
22 without understanding all of the facts.

23 THE COURT: Well, you know, I understand because I
24 have some familiarity with the issue that government officials
25 are still government officials and the public can talk to

1 government officials. But, you know, when there's litigation
2 ongoing, I would hope that counsel could talk to each other
3 about these kinds of matters before calling bar counsel and
4 seeing if bar counsel says, no, you won't be disciplined if you
5 do it.

6 Something is degenerating here when you all can't talk
7 to each other and I don't know how to get that back on track,
8 but we're going to have a trial here. The government now knows
9 it from my opinion yesterday. So, I mean, you all need to get
10 back on track that there has to be a way to work together to get
11 this case tried without charges and countercharges and claims of
12 bar violations and you all running to see whether or not it
13 would be a bar violation. You've got to work together some way
14 or we're never going to get this case tried.

15 And it's in the plaintiff's interest to get it tried
16 promptly. It's in the government's interest to try to work with
17 you and they're going to have to work with you. They've been on
18 some pipe dream about this case was going to go away, but they
19 now know it's not going to go away after my ruling yesterday.
20 So you all are going to have to figure out how to work together
21 in this case.

22 And all of this stuff about calling up the bar and
23 seeing if it would be unethical and I agree it's not, and then
24 they're making charges of ethical violations aren't going to
25 lead anywhere except side tracking with a lot of paper on

1 extraneous issues like all of this stuff I read last night. You
2 all have to got to figure how to work together, both sides do,
3 because this case is going to trial.

4 And cooperatively, it will go to trial sooner from the
5 plaintiff's point of view. Uncooperatively, I agree the trial
6 will be delayed, but, you know, the government doesn't want to
7 head down that road with me and the government knows me. They
8 know they don't want to head down that road with me.

9 MR. GINGOLD: Thank you, Your Honor. We will endeavor
10 to do everything possible to work cooperatively with the
11 government going forward. There has been some problems.

12 THE COURT: I think maybe both sides need to rethink
13 where you are and have a good meeting next week and talk about
14 where you are, because there needs to be a dose of realism and I
15 think my 50 pages yesterday should engender a dose of realism
16 about where this case is headed.

17 MR. GINGOLD: Thank you. With regard to a couple of
18 issues in addition that Mr. Weiner has raised. The issues with
19 regard to the witnesses in the depositions are understood by us
20 a bit differently than understood by Mr. Weiner.

21 We had a situation where we have been trying to comply
22 with the court's scheduling order. We have noticed our
23 depositions, that's correct, prior to discussing the time and
24 dates with the government. In every single deposition notice
25 that we've issued in the past, we have worked with the

1 government and accommodated every possibility of an
2 inconvenience either for counsel or for the witnesses.

3 THE COURT: I agree.

4 MR. GINGOLD: That is what we were fully intending to
5 do with regard to these notices.

6 THE COURT: But the more civil way to practice is to
7 call first and that is what I encourage lawyers to do. That's
8 why I made my initial comments.

9 MR. GINGOLD: Your Honor, we will do that, Your Honor.
10 We do not want to get into all of other squabbles in that regard
11 which are too numerous to mention and burden this court.

12 However, there is a serious issue with regard to the
13 witnesses' depositions, we need some guidance on.

14 THE COURT: Okay.

15 MR. GINGOLD: There were Price, Waterhouse witnesses
16 that were deposed this week. One is Jessica Pollner, who is the
17 principal statistical expert of Price, Waterhouse, Coopers. The
18 other is Jeffrey Rampel (Ph), who is a third year professional
19 staff member at Price, Waterhouse, Coopers.

20 We understood the scheduling order because of the time
21 constraints to focus on obtaining information relative to the
22 first component of the case which is fixing the system.

23 We have not endeavored to obtain additional
24 information in this regard with regard to the second component
25 of the case because of the fact we have a trial scheduled for

1 March 15th. Tight schedule, we all know that and we're trying
2 to stick to it.

3 As of right now, the government has even provided us
4 with a witness list.

5 Now, the government hasn't seemed to pay much
6 attention to the requirements of the scheduling orders. The
7 government, as I understood their briefs that were recently
8 filed, indicated that the burdens that have been placed on them
9 based on our discovery requests have made it difficult for them
10 to comply within the time periods established.

11 In the course of the last two depositions this week,
12 in the first deposition there were seven government lawyers
13 there. Second deposition, there were six government lawyers.

14 Out of approximately seven to seven and a half hours
15 of the first deposition, Ms. Pollner was asked probably five to
16 six hours of questions unrelated to fixing the system or related
17 to the expert opinion that is to be prepared relative to fixing
18 the system and provided to the Department of Justice on or
19 before December the 15th.

20 In the context of the difficulty we have had, number
21 one, we have no expert opinion written yet. We are preparing
22 it. To provide information with regard to an expert opinion on
23 fixing the system from a statistician who stated repeatedly that
24 she was not an expert on fixing the system did not seem
25 reasonable at that point in time for her to answer.

1 Number one, she claimed she wasn't competent to answer
2 the question, and number two, without regard to whatever Price,
3 Waterhouse, Coopers is doing, they have not prepared it yet.
4 They are considering various things and we have not even met
5 with Price, Waterhouse, Coopers with regard to that report.

6 So we felt after hours and hours of questioning with
7 that regard, with the continuation of Ms. Pollner's deposition
8 on Monday with regard to the statistical analysis which is
9 unrelated to the first part of the case, we think it's highly
10 inappropriate at this point in time, Your Honor.

11 With regard to Mr. Rampel, Mr. Rampel has no authority
12 on behalf Price, Waterhouse, and he stated it repeatedly, to
13 offer any opinions with regard to any of the issues he's working
14 on.

15 Numerous questions were asked as late as five minutes
16 after 6:00 last night about Mr. Rampel's understanding or
17 involvement in the statistical sampling issues in this case.

18 While we did have a break for lunch and we did have a
19 lunch for us all to review your opinion yesterday, Your Honor,
20 nevertheless the deposition from 9:00 or 9:20 in the morning
21 until 6:05 in the evening on questions that he has no authority
22 to answer, on questions that he is not an expert on, we think is
23 inappropriate to say the least, and at a certain point in time
24 we had to step in and stop this.

25 If the government doesn't have --

1 THE COURT: The problem with that is, if the answer to
2 the question at a noted deposition is not privileged, then the
3 way to stop is to ask the court, which you can do orally by
4 contacting my chambers, for a protective order and I'll schedule
5 a prompt hearing on it.

6 It's really not to just instruct the witness not to
7 answer. On a matter not privileged, you've got to either recess
8 the deposition and maybe you can agree on when you'll present
9 the question to me or if you can't agree, contact my chambers
10 and ask for an oral hearing on the Motion for Protective Order.
11 But on non-privileged matters, that's the only option you really
12 have opened to you.

13 I take it from your comments here today, you would
14 like a protective order about continuing the deposition of
15 Pollner and Rampel?

16 MR. GINGOLD: That's correct, Your Honor.

17 THE COURT: And I'll give you that until I can hear
18 the matter and I can either hear it the 23rd or the 24th.

19 MR. GINGOLD: Thank you, Your Honor. We also have
20 depositions scheduled of another Price, Waterhouse witness, Ms.
21 Gooding, on Monday. My expectation is the same approach is
22 going to be needed in her regard, and we would request --

23 THE COURT: What is her name?

24 MR. GINGOLD: Laura Gooding. G-O-O-D-I-N-G. And it's
25 important in this regard when we provided the defendants with

1 our witness list, we identified Ms. Pollner and Mr. Rampel and
2 Ms. Gooding as fact witnesses with regard to fixing the system,
3 not expert witnesses and only fact witnesses with regard to
4 their observations made during the site visits. The way the
5 language of the witness list is written, it is with regard to
6 agency or area office trust practices essentially and it's only
7 with regard to their observations there.

8 In fact there has been no discussions with Price,
9 Waterhouse about the scope of their testimony, the nature of the
10 testimony. The witnesses specifically stated that if they were
11 to testified they were expected to testify on what they
12 observed.

13 Nevertheless, after six or seven or eight hours of
14 questioning, much of which was substantially beyond that -- we
15 probably should have called you, Your Honor, but nevertheless we
16 terminated the deposition. We will endeavor to call your honor
17 in the future.

18 THE COURT: I will temporarily stay those until the
19 November 23rd hearing then.

20 MR. GINGOLD: Thank you, Your Honor. In that regard,
21 there's one more point. We have provided or will provide Ms.
22 Cobell, the named plaintiff in the case, for deposition on the
23 16th based on an agreement with counsel.

24 The issue with regard to the name foundations that
25 have provided funding for this case was asked of these fact

1 witnesses, and in addition we expect that same question to be
2 asked of Ms. Cobell, and we would like the court to consider
3 this issue specifically.

4 THE COURT: Do you need a Motion for Protective Order
5 which ought to be in writing as to that kind of an issue.

6 MR. GINGOLD: We will do that, Your Honor.

7 THE COURT: As soon as you get it filed, then you can
8 rely on having filed the Motion for Protective Order to protect
9 her from answering those questions on the 16th.

10 MR. GINGOLD: Thank you, Your Honor.

11 THE COURT: Until I rule on the question of whether
12 that's an appropriate line of questions.

13 MR. GINGOLD: Thank you, Your Honor.

14 THE COURT: But you need your written Motion for
15 Protective Order filed before that deposition on the 16th. And
16 in this instance, having discussed, I won't insist that it
17 granted but just be filed.

18 MR. GINGOLD: Thank you very much, Your Honor.

19 THE COURT: All right. Any other issues you want to
20 raise, Mr. Weiner?

21 MR. WEINER: Yes, Your Honor.

22 Your Honor, in the context of the protective orders
23 that you've just described to regarding Ms. Pollner's
24 deposition, the government is prejudiced by that significantly.

25 We know nothing about plaintiff's proposed plan. They

1 refused to allow the witness, their expert who testified that
2 she is the statistical expert who will testify about their plan,
3 to tell us what it is, what it anticipates.

4 We're now expected to show up on the 24th for a
5 hearing on dates setting the retrospective relief that
6 incorporates their plan, and yet when we try to take discovery
7 from their witness who can tell us what their plan was, they
8 refused to allow her to testify, and now, we're not going --

9 THE COURT: Well, you're in the same position then
10 where you wouldn't let any of your people testify and they came
11 in and moved on that.

12 MR. WEINER: Your Honor, they have the discovery.
13 They know everything there is to know about our system.

14 THE COURT: Any other issue you want to raise?

15 MR. WEINER: Yes, Your Honor. I do think that
16 plaintiffs' characterization of our depositions is terribly
17 misleading and we would like to set the straight on that.

18 THE COURT: File them with me. Anything else you want
19 to raise?

20 MR. WEINER: Again, Your Honor, we would request an
21 opportunity to have the opportunity to find out what their
22 statistical plan is before we have to recommend a trial date to
23 this court on the 24th.

24 THE COURT: You don't have to recommend any date. I'm
25 going to ask facts and I'll decide the date. I'm not asking you

1 for any recommendation.

2 I'll see you all on the 23rd.

3 (Proceedings concluded at 2:46 p.m.)

4 CERTIFICATE OF REPORTER

5 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
6 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

WILLIAM D. MCALLISTER
OFFICIAL COURT REPORTER

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